

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

GREG RICE, Individually, and as Personal
Representative of the Estate of JOHN
RICE,

CASE NO. 50 2006 CA 005780 XXXX MB
AJ

Plaintiff,

vs.

TENET GOOD SAMARITAN, INC.,
WAYNE WEIDENBAUM, M.D.,
ANESTHESIOLOGY ASSOCIATES OF
THE PALM BEACHES, P.A.,

Defendants.

**PLAINTIFF'S RESPONSE IN OPPOSITION TO THE DEFENDANTS'
MOTIONS TO DISMISS PLAINTIFF'S COMPLAINT AND/OR
MOTION TO STRIKE**

The Plaintiff, GREG RICE, Individually, and as Personal Representative of the Estate of JOHN RICE, by and through his undersigned counsel, respectfully files this response opposing Defendant's, TENET GOOD SAMARITAN, INC.'s (TENET), motion to dismiss his complaint and/or a motion to strike it, and Defendants', WAYNE WEIDENBAUM, M.D.'s, and ANESTHESIOLOGY ASSOCIATES OF THE PALM BEACHES, P.A.'s, Motion to Dismiss Complaint, and in support thereof states as follows:

I. RESPONSE

1. Mr. RICE wishes to reiterate that this is not a medical malpractice claim, nor is it a wrongful death claim.

2. At this point, any allegations regarding the Defendant's medical negligence are made

only from an evidentiary and proof perspective, and admittedly do not provide the basis for a medical malpractice cause of action.

3. Still, Mr. RICE asserts that TENET knew that his twin brother and business partner, John, died as a result of its negligence (Complaint - ¶13). Additionally, subsequent to John Rice's death, the hospital informed the medical examiner's office (an entity that does not investigate deaths of patients who die from natural causes) that John Rice died of a heart attack on the way to the operating room (Complaint - ¶15). The Defendant deliberately lied to the medical examiner's office by failing to inform it that John Rice was only in the hospital for a fractured femur, and died as a result of failure to obtain an airway leading to a code, not a heart attack (Complaint - ¶15).

4. The hospital went so far as to advise the medical examiner investigator (upon being asked whether there were any misadventures that had led to John's death), that it would be issuing a death certificate reflecting natural causes, and that the case was ripe for release to assignment to a funeral home (Complaint - ¶15).

5. The hospital then destroyed evidence by extubating John Rice, thereby preventing the medical examiner from definitively verifying that he was negligently intubated once an intubation was finally accomplished (Complaint - ¶15). The hospital also falsely noted that a chest x-ray verified a proper placement in intubation, when in fact, the x-ray clearly showed the intubation had been incorrectly performed (Complaint - ¶15). The hospital then falsely stated in a medical record that a tracheotomy could not be performed due to the fact that the trachea was not palpable when it clearly was (Complaint - ¶15). There was also no evidence that a heart attack had occurred (Complaint - ¶15).

6. Then, despite its explicit knowledge that his brother did not die of a heart attack, the

hospital nevertheless informed the Plaintiff of that fact (Complaint - ¶16). The Plaintiff learned about the negligent treatment and subsequent coverup after obtaining the post-mortem report and speaking with the medical examiner adding to the intense emotional distress he was suffering from the loss of his brother (Complaint - ¶16).

7. As to Defendant WEIDENBAUM, he knowingly took part in a conspiracy to conceal the true cause of John Rice's death by informing the medical examiner's office that the death was caused by natural causes on the way to the operating room (Complaint - ¶23). The Defendant also deliberately failed to inform the medical examiner investigator that the decedent was only in the hospital for a fractured femur and had a complete failure to obtain an airway leading to a code and not a heart attack (Complaint - ¶23). This Defendant also participated in the coverup.

8. In light of the closeness between these twins, both "little people," sharing a unique bond, who were each other's best friends, confidants, and business partners, the actions by the Defendants in this case were indeed outrageous.

II. ARGUMENT

- A. *The allegations referring to instances of medical negligence, are directly pertinent here, notwithstanding that this case does not attempt to state a cause of action for medical malpractice, because Plaintiff asserts that these physicians were not truthful to him about his brother's death and attempted to cover up their own mistakes.*

Mr. RICE asserts two counts in his complaint: one against TENET for its outrageous conduct in causing him severe emotional distress, and the other, for similar outrageous conduct against the anesthesiologist, Dr. WEIDENBAUM, both of whom were involved in his brother's fatal operation. Mr. RICE has explicitly stated that he has not sued for either medical malpractice or wrongful death. Instead, it is important for this court to understand that the thrust of Mr. RICE's claim of outrageous

conduct stems from his claim that these Defendants purposely tried to **hide** their alleged malpractice from Mr. RICE, intentionally advising him that his twin brother/best friend/business partner's untimely death arose out of a heart attack on the way to the operating room.

Plaintiff also alleges that in an attempt to conceal the truth, the Defendants destroyed evidence by extubating John Rice, and falsely noted that a chest x-ray verified proper placement of intubation, when the x-ray clearly showed the intubation was incorrectly performed. Thus, while this is not a medical malpractice case per se, the outrageous conduct definitely stemmed from what began as medical negligent acts that then led the Defendants to engage in outrageous conduct.

B. While there appears to be some authority for allowing a trial court to dismiss a complaint for failure to state a cause of action for outrageous conduct, the Fourth District has indicated that if a cause of action is stated, it is more appropriate to evaluate the facts on summary judgment or directed verdict.

In *Baker v. Florida Nat. Bank*, 559 So. 2d 284, 287 (Fla. 4th DCA 1990), the Fourth District affirmed summary judgment entered by the trial court on the plaintiff's claim for intentional infliction of emotional distress. In explaining its ruling, the Fourth District relied upon *Diamond v. Rosenfeld*, 511 So. 2d 1031 (Fla. 4th DCA 1987)(affirming a JNOV, finding no claim for intentional infliction of emotional distress existed). *Baker* also cited to *Scheller v. American Medical International Inc.*, 502 So. 2d 1268 (Fla. 4th DCA 1987), where the trial court was affirmed for dismissing a case for intentional infliction of emotional distress. However, *Scheller* involved a soured **business relationship** between the plaintiff and the defendant, and found the only claim plaintiff was making where questions of fact existed, was the interference with an advantageous business relationship claim, because the facts involving the "**arms length**" relationship, did not rise to the level of outrage encompassed in an intentional infliction of emotional distress claim.

C. While the question of what constitutes "outrageous" conduct must be ascertained case-by-case, the trend both in Florida and elsewhere seems to always find cases involving and surrounding the circumstances of death and dying of a close family member, to state a cause of action for outrageous conduct and/or a tort of intentional infliction of emotional distress.

When this court peruses the few cases in this State which have found facts egregious enough to state a cause of action for the tort of outrage, it will find a common thread among them: *i.e.*, all of these cases arose out of facts and circumstances somehow related to the treatment of a person or his or her family after a death.

The first case to follow the supreme court's recognition of the tort in *Metropolitan Life Ins. Co. v. McCarson*, 467 So. 2d 277 (Fla. 1985) was *Kirker v. Orange County*, 519 So. 2d 682 (Fla. 5th DCA 1988), which involved a claim arising out of allegations that the medical examiner removed a deceased child's corneas and eye globes, despite an express objection by her mother, and then attempted to cover up the removal, by falsifying the autopsy report. *Id.* at 682-683. In refusing to dismiss the plaintiff's complaint, *Kirker* relied upon several other cases that had involved the mishandling of a corpse (*Scherer v. Rubin Memorial Chapel, Ltd.*, 452 So. 2d 574 (Fla. 4th DCA 1984), wrongful embalming (*Scheuer v. Wille*, 385 So. 2d 1076 (Fla. 4th DCA 1980), and a failure of a defendant to dispose of a decedent's ashes in accordance with specific instructions (*Smith v. Telophase National Cremation Society, Inc.*, 471 So. 2d 163 (Fla. 2d DCA 1985). *Kirker* at 683-684.

Since *Kirker*, one court found a complaint by parents of a missing child against a television news program which broadcast a picture of the missing child's skull to state a claim for "outrage." *Armstrong v. H&C Communications, Inc.*, 575 So. 2d 280 (Fla. 5th DCA 1991). Another case allowed a cause of action to go forward when police officers gratuitously disclosed photographs and

a videotape of an autopsy. *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

The cases which have not allowed this cause of action to proceed have been under inherently less sensitive circumstances; *e.g.*, employment and other professional relationships. For example, the Defendants rely on *State Farm v. Novotny*, 657 So. 2d 1210 (Fla. 5th DCA 1995), where the plaintiff claimed her employer intentionally inflicted emotional distress, because it subjected her to a rigorous interview in an attempt to entrap her into admitting that she had accepted a free paint job by a body shop owner, and then lied to her about the reason for conducting the interview. Similarly, in *Le Grande v. Emmanuel*, 889 So. 2d 991 (Fla. 3d DCA 2004), the court upheld the dismissal of a Baptist minister's complaint which alleged that at a congregational meeting, the Defendants had lied and said that the pastor had purchased a Mercedes and cash with money he stole from the church, and that the pastor was Satan and another name which meant he was a part of the oppressive secret police of Haiti. *Id.* at 993. The Third District wrote that while it recognized that "being branded a thief in front of one's parishioners might certainly be unsettling, embarrassing, and/or humiliating for a member of the clergy," the court did not believe that this alleged conduct was the type of extreme and outrageous conduct needed to support a claim for intentional infliction of emotional distress. *Id.* at 995.

In *Baker v. Florida National Bank*, 559 So. 2d 284 (Fla. 4th DCA 1990), the plaintiff sued a bank that was acting as his trustee, for its poor investment plan against which the plaintiff had expressly advised the bank. At some point during the course of the bank's poor investment decisions, the plaintiff entered a hospital due to angina and ventricular arrhythmia which he attributed to the aggravation of his medical condition due to the bank's conduct. *Id.* at 287. Still, the court found that in examining the activities at the bank, they did not rise to the level where the

activity complained of was more than the assertion of legal rights the bank had within the trust agreement in a legally permissible way, and that the bank's actions were thus privileged under those circumstances. *Id.* at 289.

In *Valdes v. GAB Robbins North America, Inc.*, 924 So. 2d 862 (Fla. 3d DCA 2006), a plaintiff and his wife sued his worker's compensation carriers, adjustors, and their employees alleging among other things, intentional infliction of emotional distress for the carrier having brought false criminal charges against them. In explaining its ruling, the court wrote:

While the anxiety and stress of being charged by the Division of Insurance Fraud with making false statements and being arrested by the State in connection with those charges is understandable, the appellees' behavior in investigating Valdes and then allegedly falsely reporting to the Division of Insurance that Valdes had committed fraud is not the type of conduct that is so outrageous in character and extreme in degree as to go beyond the bounds of decency and be deemed utterly intolerable in a civilized society. *Id.* at 866.

Here, however, as was the case in *Kirker* and the cases cited therein, the intentional infliction of emotional distress arose out of the intentionally concealed communication of the circumstances of a man's death to his twin brother with whom he share a unique bond. While Mr. Rice has found no case on point in the State of Florida, a Delaware case--while certainly not binding--is persuasive to this Honorable Court due to its factual similarities with our case.¹

In *Ciarlo v. St. Francis Hospital, Inc.*, 1994 WL 713864 (Del. Super. 1994), the estate of a woman brought suit against a hospital both for wrongful death (allowed in that state) and for the

1

In *Rodriguez-Cayro v. State*, 828 So. 2d 1060 (Fla. 2d DCA 2002), Judge Altenbenond speaking for the majority cited to an unpublished out-of-state opinion yielded through computer research and noted: "This 'unpublished,' yet published opinion is at least worthy of our consideration to assess the correctness of our reasoning." *Id.* at 1061, n. 2.

conduct by the hospital's administration related to the activities leading to and causing the death of Mrs. Ciarlo. There, 82 year old Mrs. Ciarlo had been admitted to the hospital, and was scheduled to receive an injection of Lasix. Instead, she received an injection of potassium chloride by mistake. *Id.* at 1. Shortly after the mistake was made, she died. *Id.*

The woman's adult children who were awaiting word that their mother had been discharged back to her nursing home, were then told that their mother had passed away. *Id.* at 2. The children had gone to the hospital and "were advised that their mother had just died peacefully." *Id.*

At the end of that day, after the family began making funeral arrangements, the hospital president contacted the family and advised that he believed Mrs. Ciarlo had actually died as a result of being given the wrong medication. They were then told that an autopsy would have to be performed, but by that time, the woman's body had already been embalmed. *Id.* at 2. As a result of such developments, the funeral had to be postponed. *Id.*

The court noted that the family members were not told of how their mother died until several hours after her death, even though the IV nurse knew immediately and had advised the assistant head nurse. The hospital continued to maintain that the mother had died peacefully, although the children later found out that that was not true. *Id.*

In upholding a claim for punitive damages in the plaintiffs' survival action, the court noted that the conduct was indeed "outrageous." *Id.* at 5. The trial court went on to conclude that the children had stated a claim for intentional infliction of emotional distress because a fact finder could reasonably conclude that the actions of the hospital constituted extreme and outrageous conduct. *Id.* at 8; 8-9.

This rather factually similar case should assist this Honorable Court in denying Defendants'

motions to dismiss. Like *Ciarlo*, Mr. RICE was initially advised that his brother's death had been natural and unavoidable, and like the *Ciarlo* case, Mr. RICE later found out that this was not true, and that the hospital had intentionally tried to prevent him from learning the truth. This is a case, where twin brothers possessed an extremely tight bond as evidenced by their partnership in most aspects of their lives, and in some way, GREG RICE may be analogized to the "eggshell skull" plaintiff discussed in *Silva v. Stein*, 527 So. 2d 943, 944 (Fla. 3d DCA 1988) who would be considered to be exceptionally sensitive to the outrageousness of these Defendants' conduct due to the nature of his relationship with the decedent. Here, Defendants purposely deceived the surviving brother about the facts surrounding his brother's untimely and negligent death, making this one of those unique cases where the fact finder could reasonably conclude that the actions of TENET and Dr. WEIDENBAUM were extreme and outrageous, and thus actionable.

Defendant WEIDENBAUM's reliance on *Gonzalez-Jimenez De Ruiz v. U.S.*, 231 F.Supp.2d 1187 (M.D. Fla. 2002) is misplaced. *Gonzalez-Jimenez De Ruiz* found that there was no outrageous conduct when a prison deceived a family about their inmate relative's medical condition and failure to inform them of his death. In that case, plaintiffs alleged that a prison official told a family friend that the inmate was suffering from back pain and did not know why he had not telephoned his family. *Id.* at 1199, n. 44. The same official then informed the inmate's father that he was fine, advising the father that the inmate did not want to see him, but that his health was fine, notwithstanding that he was receiving cancer treatment. *Id.* The plaintiffs also alleged that when a family member visited the inmate at a hospital, she was distraught by his condition, and the treatment he was receiving, and prison officials made it extremely difficult for the family members to visit him, further not permitting the man's minor children to see him before he died. *Id.* Finally,

plaintiffs alleged that the prison officials failed to contact them upon the man's death, and delayed nine days in transporting his remains. *Id.*

Most notably distinguishing *Gonzalez-Jimenez De Ruiz* from this case were the judge's words:

It should be remembered that at all times when the events were occurring in this case, Mr. Ruiz was an inmate in a Federal correction facility. Thus, the suggestion that the BOP restricted access to Mr. Ruiz by visitors is neither shocking nor unexpected, as Federal inmates are typically limited in receiving visitors. *Id.* at 1200.

The court also determined that watching a relative die of a terminal illness always brings about emotional distress even if the prison had allowed them to witness it. *Id.* It was on that basis--one far different from the facts here--that the court concluded that the plaintiffs failed to establish actions which could have been characterized as being beyond "the bounds of decency" and "utterly intolerable in a civilized community."

D. Conclusion.

Because Mr. RICE's case as alleged falls within that discrete arena of cases where a cause of action is stated for the Defendants' extreme and outrageous conduct, this court should respectfully deny both Defendants' motions to dismiss.

WHEREFORE, the Plaintiff, GREG RICE, Individually, and as Personal Representative of the Estate of JOHN RICE, respectfully requests this court to deny both Defendant's, TENET GOOD SAMARITAN, INC.'s, Motion to Dismiss Plaintiff's Complaint and/or Motion to Strike, as well as

the Defendants', WAYNE WEIDENBAUM's and ANESTHESIOLOGY ASSOCIATES OF THE PALM BEACHES, P.A.'s, Motions to Dismiss.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by U.S. mail and facsimile this 13th day of September, 2006 to: MICHAEL V. BAXTER, ESQ., Billing, Cochran, Heath, Lyles, Mauro & Anderson, 400 Australian Ave., Suite 500, West Palm Beach, FL 33401; and KEITH PUYA, ESQ., and ANTHONY GOODMAN, ESQ., Stephens, Lynn, Klein, La Cava, Hoffman & Puya, P.A., 515 N. Flagler Dr., Suite 1600, West Palm Beach, FL 33401.

JULIE H. LITTKY-RUBIN, ESQ.
KEVIN C. SMITH, ESQ.
Lytal, Reiter, Clark, Fountain & Williams, LLP
P.O. Box 4056
West Palm Beach, FL 33401
Telephone: (561) 655-1990
Facsimile: (561) 832-2932
Attorneys for Plaintiff



BY: JULIE H. LITTKY-RUBIN, ESQ.
Florida Bar No. 983306